No. 04-1327

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

BOBBY LEE HOLMES,

Petitioner,

vs.

STATE OF SOUTH CAROLINA ,

Respondent.

On Writ Of Certiorari
To The Supreme Court of South Carolina

BRIEF FOR RESPONDENT

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Capital Case

QUESTION PRESENTED

In South Carolina, a criminal defendant's evidence of third-party guilt is inadmissible if, when comparing this evidence standing alone against the prosecution's evidence, the trial court finds that it fails to create a reasonable inference of innocence. In making this comparison, if the trial court finds the prosecution's evidence - and especially its forensic evidence - to be "strong", third-party guilt evidence is per se inadmissible because it is deemed, as a matter of law, to be insufficient to "overcome" the prosecution's evidence so as to create a reasonable inference of innocence.

1. Whether South Carolina's rule governing the admissibility of third-party guilt evidence violates a criminal defendant's constitutional right to present a complete defense grounded in the Due Process, Confrontation, and Compulsory Process Clauses?

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STATEMENT OF THE CASE

A. The Assault, Rapes, and Burglary of Mary Stewart.

After fleeing from the police,[1] between 6:00-6:30 a.m., Holmes went to 224 California Street, the home of Ms. Mary

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[1] **Holmes Fight and Flight to Mary Stewart's Home.**

On December 31, 1989, there was a fight at the Cannon Court apartment complex in York, South Carolina, approximately one mile from Mary Stewart's home and Holmes's father's home. J.A. 163-164. See State Exhibit 31. The confrontation involved Bobby Holmes and Bobby Hemphill. J.A. 175. Officer Grady Harper of the York Police Department received a call at 4:43 a.m., to respond to the disturbance, and he arrived there at 4:45 a.m. Upon his arrival, a number of people, including Holmes, were making a disturbance. Officer Harper told them to quiet down and move on. J.A. 165-166. Holmes was unruly and Officer Harper called for back-up to assist in the arrest. J.A. 166. 172-173.

By this time, Officers Richard McCarter and Otis Driggers also responding to the 4:43 a.m. call had arrived on the scene. Because Holmes refused to leave the scene, the officers moved to arrest him for disturbing the peace. J.A. 166-167. He ran from them, behind the apartments, and then he jumped over a 5½ - 6- foot tall brick wall. Officer Harper saw Holmes get into the car of Terrance Digsby, where he laid down in the back seat. J.A. 169, 177-178. Officer Harper, who had left Cannon Court, saw Holmes and followed Mr. Digsby's car down Ross Cannon Street and right onto First Street where Mr. Digsby turned left into a yard.

When the car stopped Holmes got out and ran behind a church. J.A. 170-171, 174. Officer Harper proceeded to place a call to Officers McCarter and Driggers who spotted Holmes in front of the church at about 5:15 a.m. He ran in front of their patrol car, through a yard, then into some weeds and a ditch. Officers McCarter and Driggers pursued Holmes until he disappeared after going into a ditch. He was last seen in the chase about 5:20 a.m. J.A.175. He was wearing a black hooded sweater and blue jeans. ROA 2423. Evidence revealed that he was within 870 feet of Stewart's home by his own statements.

Stewart, an 86-year-old retired school teacher.[2] Holmes opened the unlocked screen door and began knocking on the inside door. When Ms. Stewart reached the door, he burst into the house and began to beat her in the head while asking for her money. Ms. Stewart told him that her money was in her purse. Holmes searched the purse and found $40 that Ms. Stewart's friend, Mrs. Alaine Byers, had brought Ms. Stewart in cashed checks. Wanting more money, Holmes continued to beat Ms. Stewart until they reached the bedroom. Fearing Ms. Stewart had seen his face, Holmes tried to rape Ms. Stewart vaginally. Because he was physically too big to do this successfully, he raped Ms. Stewart anally, spreading blood o er the clothes and sheets. He then left, after ripping the living room telephone off the wall.

B. The Discovery of Ms. Stewart.

At 7:45 a.m. that same morning, Mrs. Maggie Thrasher called Ms. Stewart to check on her, but did not get an answer after six (6) or seven (7) rings. ROA 2147-48. Shortly thereafter, Ms. Stewart called back and told Mrs. Thrasher, in a shaky voice, about the circumstances that she had been beaten and raped. J.A. 141, ROA p. 2148-49. She told Ms. Thrasher that someone had knocked on her door and when she opened it, he pushed right in and asked for money. When she told him she did not have money he began to beat her and rape her. She said he first tried to get in her front but he was too big and he then went into her rectum. He left when she said she'd clean herself up. ROA p. 2149. Thrasher

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[2] Later that day, Officer Edwards talked to several of the victim's neighbors. Ms. Boyd told him she heard knocking at her door about 3 a.m.; Mr. Lynn, who lived next door to the victim, reported knocking between 5:30 a.m. and 6:30 a.m.; Ms. Diggs, who lived on the other side of the victim, heard someone knocking on her door around 6 or 6:30 a.m., and Ms. Sparks who heard someone knocking at her door at daylight. None of these witnesses were able to give a description since they had not answered the door. ROA 2212-2214.

stated that the victim described the assailant as "a dark chunky fellow" and "kind of short, dark skinned fellow, chunky wide." 142. The victim stated to her that he took $40.00. J.A. 141.

Mrs. Thrasher proceeded to call Mrs. Byers, who had a key to Ms. Stewart's house. J.A. 142. Mrs. Byers rushed over to Ms. Stewart's house where she found a messy house and Ms. Stewart in the bedroom. J.A. 143. When asked who did this to her, Ms. Stewart told Byers that "I don't know who it he was. All I know is he was big and dark." J.A. 144. The victim then told Byers that the perpetrator tried to use her vagina and he couldn't and he used her rectum. ROA p. 2167. Mrs. Byers went to call the police, but the phone was off the wall so she went to the police department. ROA p. 2167-68. The police then sent help immediately.[3]

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[3]**The Treatment of Ms. Stewart**

While the three police officers were there, two paramedics arrived to transport the victim to a local hospital emergency room. Mrs. Linda Lowman, an EMT with the York Rescue Squad, arrived along with her husband at Ms. Stewart's house. ROA p. 2221. Ms. Stewart was in her bedroom complaining about pain in her hips. ROA p. 2222. Mrs. Lowman and her husband carried Ms. Stewart out to the ambulance. ROA p. 2223. Ms. Stewart's vital signs were taken and her pulse and blood pressure were higher than normal. ROA p. 2224-25. Ms. Stewart was taken to the hospital. Her primary impression was "multi-trauma shock."

Ms. Stewart was received at 9:00 a.m. on December 31, 1989 at Divine Savior Hospital by Mrs. Carol Cole, an emergency room nurse. ROA p. 2230-31. Ms. Stewart had bruises on her face and was complaining of pain in her hips and head. ROA p. 2235. Nurse Cole's notes reflected similar summary of the incident included "the number of assailants was one. Late twenties. Black. He was a stranger." J.A. 149. Nurse Cole and Dr. Todd Gwinn began following and using a rape protocol kit when they examined Ms. Stewart. ROA p. 2233, 2258-60. The exam was stopped when the pelvic exam began because Ms. Stewart complained about the pain in her hips and they wanted to make sure nothing was broken before they attempted it. J.A.145, 149-150. ROA p. 2236, 2260-61. The rape protocol

Officer Dale Edwards of the York Police Department was the first to arrive on the scene. Officer Wilson Barnett arrived soon thereafter. J.A. 157. ROA p. 2179-82. They asked Ms. Stewart what happened and she told them that she had answered the door, a black male forced his way in, pushed her back into the bedroom, tore her nightgown off and attempted to rape her vaginally, then began to have anal sex, while beating her head.

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kit was given to law enforcement officials. ROA p. 2239. When Dr. Gwinn checked on Ms. Stewart at 11:00 a.m., she had become confused and her speech was garbled. J.A 153-54 Dr. Gwinn felt that Ms. Stewart needed an emergency CT scan to check for bleeding on the brain, so he transferred her immediately to Piedmont Medical Center. J.A. 154; ROA p. 2262.

When Ms. Stewart arrived at noon at Piedmont Medical Center, she was confused and she could not control her bladder or bowels. She had an incontinent stool which caused rectal bleeding. Her blood pressure went down and she became diaphoretic. Ms. Stewart's condition continued to deteriorate to the point where a tube was put in to breathe for her. A catheter was put in to drain her bladder. She was put on a helicopter at 3:00 p.m. to be taken to Carolinas Medical Center. By this time, Ms. Stewart was not coherent.

Dr. John Macey at Charlotte Memorial Hospital (now called Carolina Medical Center) in Charlotte performed a complete rape trauma kit after she arrived on December 31. J.A. 154. ROA p. 2281-84. She was unable to respond at that time. ROA p. 2282-83. The kit was handed over to Scott Johnson of the York City Police. J.A. 155.

Ms. Stewart was treated for her head trauma, but her condition continued to deteriorate. After no improvement, she was discharged in a vegetative condition with a feeding tube to Meadow Haven Nursing Home on February 16, 1990. ROA p. 3123-25. Ms. Stewart died of pneumonia at Meadow Haven Nursing Home on March 10, 1990. ROA 3600-01. See J.A. 248-249.

J.A. 144. She said he then took $40.00 from her pocketbook and left. She then went and took a shower. J.A. 144-145.[4]

Officer Edwards removed the sheets and pillowcase from the bed for use as evidence, and placed the items in a paper grocery bag taken from the victim's kitchen. ROA 2183 - 2187. Lt. Barnett arrived and assisted in the evidence collection. A pink nightgown, a housecoat, and a rag were removed from the bathroom and placed in another grocery bag. JA 147-148. The victim gave Officer Edwards a pink paper towel with blood on it. JA 146. He placed the paper towel in a separate manila envelope brought to the scene by Captain Mobley, the third officer on the scene. JA 148. ROA p. 2184-2190, 2203. Captain Mobley collected the nightgown, robe, and napkin, as well as the sheets from Ms. Stewart's bed and her purse. Captain Mobley also dusted for fingerprints and he found a latent palm print on the inside of the front door and a latent fingerprint on the outside of the front door.

D. Bobby Holmes Arrest and the Processing of the Scene.

Captain Mobley testified that after Officer Edwards and Lt. Barnett left the victim's apartment, he locked the front door

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[4]Officer Barnett would later complete a taped interview with the victim after she was transported to Divine Savior Hospital for treatment that date. J.A. 157. State Exhibit 9. She described the perpetrator as "The hair was kind of long, not too long, but a little longer than you usually wear it" and that "he was middle aged, he was young. He was not too young. And he , as I remember, his hair was not short or not too long." J.A. 159-160. She stated that the hair was longer than Officer Barnett's was at the time. ROA 2352. She also told Barnett that he had on a "dark jacket, must have been blue or black, must have been black because you see, I don't see too well, you know, without my glasses. J.A. 161. She also stated that he had on "a pair of funny looking pants . . . not the old pant, but something that's kind of mixed up you know." ROA 2348. She also described her attacker as "dark skinned", "not too heavy, not too slim" "real dark." ROA 2356.

and began processing the scene. J.A. 180-181. He stated that Edwards had advised him that they had already seized taken the bed linen, a nightgown and a paper towel. ROA 2481. Mobley received these items from him which had already been bagged. Id. In processing the scene, he seized a second paper towel located in the trash can in the bathroom. ROA 2483. State Exhibit 13. He sealed the towel at that time with evidence tape in a paper bag. ROA 2484. He also seized the telephone touched by the assailant and the victim's purse. He then dusted the apartment for fingerprints. J.A. 181. On the interior side of the front door, he photographed and then lifted a latent partial palm print located slightly above the doorknob. J.A. 182. (The inside palm print was later identified as that of Holmes by Agent Derrick of the State Law Enforcement Division. J.A. 211-215). Captain Mobley also photographed and then lifted an identifiable print from the outside of the front door. J.A. 182-183. (Agent Derrick was unable to match the outside door print with anyone. J.A. 210). Captain Mobley also found several smudges in the kitchen area, but they did not have sufficient ridge detail for identification. J.A. 182. He was unable to develop any identifiable prints from either the telephone or the pocketbook. J.A. 183, ROA 2494-95.

After processing Ms. Stewart's house on December 31, 1989, Captain Mobley expanded his investigation and Holmes became a suspect. J.A. 183. Mobley had become aware that a person wearing similar clothes to Holmes that morning was seen in the California Street area. Holmes had also been suspected of grand larceny of two (2) vehicles and warrants were issued for the Holmes's arrest on the two (2) counts of grand larceny. Captain Mobley affirmed the signing of the warrants around 2:00 p.m. and went to Holmes' father's residence. J.A. 184-185. Mr. Willie Holmes, his father, answered the door and said he did not think Holmes was home. Then, a noise came from the bedroom. ROA 2498-99. Officer James "Boot" Smith, who was with Captain Mobley, walked to the bedroom and knocked on the door identifying himself as a police officer. Holmes opened the door

wearing a black hooded sweat jacket and a pair of white briefs. Holmes was arrested for grand larceny. He put on a pair of light colored Bugle Boy jeans, a University of South Carolina baseball cap, and some Nike tennis shoes. A blue and white tank top that appeared to have blood on it was collected,[5] as well as another black sweat shirt from the washing machine, and a pair of white sweat socks. J.A. 185-186.

Holmes was taken to the York Police Department where he was booked. His clothes and wallet were taken. Holmes was outfitted in an orange jumpsuit and shower shoes. J.A. 187- 188. In Holmes wallet were a total of forty-four ($44) dollars consisting of two ten dollar bills, four five dollar bills and four one dollar bills. J.A. 188, 192. Holmes was advised of his Miranda rights, but he waived them and gave an oral statement to Bruce Bryant of SLED concerning his travels after the fight. J.A. 188, See ROA 2825-2827.. He was subsequently taken to Divine Savior Hospital to give hair and blood samples. J.A 189.[6]

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[5]Holmes advised them that the blood came from a fight the night before at Clyde's Bar . J.A. 186.

[6]**THE FORENSIC EVIDENCE**

Mrs. Nancy Greene, a forensic serologist for SLED, in 1990 matched the blood type from the nightgown and on of the paper towels (SLED 9) with blood from Ms. Stewart as being ABO Group O. ROA 3179 - 3182. The human blood found on the other paper towel (SLED 16), Petitioner's briefs, jeans, and blue and white striped tank top was initially unidentifiable under 1990 techniques. J.A. 235-236, ROA 3179-3183. Subsequently, Greene sent cuttings from the white paper towel (State Exhibit 48), cutting the jeans (State Exhibit 49), the tank top (State Exhibit 50), pink nightgown (State Exhibit 51), underpants (State Exhibit 52) and other paper towel (#19.2) to the SLED DNA Lab, with the blood vials from the rape kits and suspect kits. ROA 3186-87. She acknowledged that from her testing, there was no evidence of semen or spermatozoa present. J.A. 236.

Mr. John Barron, a trace evidence scientist for SLED, found four

THE PRE-TRIAL HEARING ON THIRD PARTY GUILT.

Holmes contended that the trial court erred in refusing to admit third party guilt evidence in the guilt phase related to Jimmy McCaw White. The proffer was initially presented at pre-trial hearings. J.A. 4-138, ROA. p. 5822-6458. The trial judge denied the motion to admit such evidence by written order. J.A. 133-138. A request to reconsider the order was denied by the trial court. J.A. 139-141. ROA 3634- 36, 3638-3656, 3709. The court later denied the presentation of the evidence in the penalty phase. ROA 4404-05. The trial court

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matches of fibers connecting Holmes with the crime scene. He found black cotton polyester fibers consistent with Holmes black sweat jacket on the bed sheets from Ms. Stewart's bed. Mr. Barron also found a blue acrylic fiber consistent with the jeans from the victim's pink nightgown. J.A. 227. He also found modacrylic fibers recovered from the pink nightgown that matched a brown modacrylic fiber ball recovered from Holmes underwear briefs. ROA p. 2997.

SLED Crime Scene Analyst Steve Derrick determined that the partial print from the inside door was consistent with Holmes's palm print. J.A. 211.

In the DNA testing done by F.B.I. Forensic Examiner Frank Baechtel, he determined that the stain on the white paper towel (Q1) matched the victim's DNA. He also determined that the stain on Holmes' underpants revealed a mixture of DNA from a male and a female; and that comparing their profiles, Holmes and the victim were possible contributors in the mixed stain to the probability of one in seventy-two million and excluding 99.99999% of the population. J.A. 244-245. The Petitioner's DNA was also found to be consistent with items recovered at the crime scene mixed with the victim's DNA. ROA p. 3526-30. Similarly, Holmes and the victim's were also the possible contributors to the DNA found on the blue and white striped shirt (Q3) and the other paper towel found at the scene (Q6). J.A. 246. Also, J.A. 236-237.

did not abuse his discretion in denying the admission of this evidence.

1. The "Holmes Did Not Do The Crime" Witnesses.[7]

Thomas Murray testified that he had heard Jimmy White in 1992 state that Holmes was in jail for nothing and that they could not bring him back for trial. He said that he heard

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[7] *The Proximity Witnesses Gilmore, Jamison, Brown and Boyd*

Taking their testimony in the light most favorable to the defense, three of these witnesses only put Jimmy White in the California Street/Pecan Circle area between 3:30 am and 5:30 am on the morning of December 31, 1989.

Meshelly Gilmore testified that she saw Jimmy White between 3:30 am and 4:30 am in the Pecan Circle apartment parking lot near Mrs. Stewart's home and was still there when she returned at 4:30-4:45 a.m. J.A. 9-14. Frenetta Jamison saw him on the hill on California Street between 4:30 am and "something to five" am after she was returning from approximately 7½ hours of drinking at Clyde's. J.A. 5-9. Deloris Brown looks briefly out of her apartment window onto California Street between 4:00 am and 5:00 am and sees an individual she identifies as Jimmy White solely by the way he walked. J.A. 95-98. Eighty-seven year old Annie Boyd, who lived in the same apartment complex as the victim testified that someone knocked on her door after she went to bed and said "open the door my man, this is Jimmy." J.A. 30. Boyd did not open the door and did not recognize the voice. She said she could not tell what time of night is was, but that it was dark. J.A. 31.

None of the witnesses were able to identify the clothing of the individual. J.A. 9, 30, Although this testimony is certainly suspect for the variety of reasons previously enumerated, even if completely credible as the trial court in its Order recognized, it does little more than place Jimmy White in the general area at some time prior to the crime. Such evidence is not inconsistent with Holmes' guilt in that none of this testimony precludes Holmes from actually being in Mrs. Stewart's home committing the assault while Jimmy White was merely in the neighborhood. Therefore, such evidence falls far short of raising a reasonable inference or presumption of Holmes' own innocence and would fall more closely into the area of conjecture of fanciful analogy.

that Homes was supposed to be on the other side of town involved in another fight. J.A. 105- 107. Murray clarified that he had never heard White admit to him that he did the crime that Holmes was accused of committing. J.A. 108-109. He also denied ever stating what was in his earlier affidavit that knowledge of White committing the crime was widespread and puts him [White] in trouble with other Rock Hill inmates. J.A. 109. Murray denied other portions of his affidavit. He denied ever stating item 4 in the affidavit concerning White framing Holmes for a dispute in with him York, because he did not know anything about it. J.A. 109-110. He also stated that he had spoken with Solicitor Pope's office that and told them that no woman had ever notarized his signature on a statement. J.A.111. Contrary to the assertion in Petitioner's brief, Murray stated that White was just saying that he knew Bobby was innocent, but he never said he did it. Id. ROA 6409.

Nancy Bennett, a secretary with the York County Public Defender's Office testified that in 1992, a client, Jimmy White came into the office for an appointment. While there, he inquired as to when the Bobby Holmes case was going to be tried. He stated to her that he didn't think that Bobby was guilty and that he knew maybe who did it and that everybody on the street knew. J.A. 37. He did not tell her who did it. Id.

John Dixon described a conversation he had with White, Thomas Murray and Thomas Walker at the Prison Farm while they were serving time. J.A. 100. He stated that Murray asked White, that " being that Bobby already got the time for it, why don't you go ahead and 'fess up to it" and that White responded "what's done is already done." J.A. 101-103. Dixon denied that White ever stated that he did it. ROA 6193-64.

2. The "Admissions of Guilt by White" Witnesses.

Mattie Mae Scott, Thomas Murray's mother, testified that in October 1997 she was at her other son James's house when Jimmy and others came to visit. Jimmy was "partially intoxicated," and when the others began talking about the 'old lady in York' that Jimmy had raped and murdered, Jimmy said, "Yes, I did it but [Holmes] is going to fry for it." J.A. 113-115. She described White as "light-skinned with a silver tooth in his mouth. ROA 6421.

Ken Rhodes testified he asked Jimmy whether the word on the street, that Jimmy was the victim's murderer, was true and that Jimmy "put his head down and he raised his head back up and he said well, you know, I like older women .... and he never called the lady's name but you know he say that he liked old women and that yeah he did what they say he did and you know that somebody else was locked up for it. And you know it's like he didn't have no regrets about it at all." Rhodes went on to testify that "[Jimmy] didn't say exactly what he done, he just told me that she had some good stuff ... He said that he didn't kill the lady. The lady was alive when he left...." J.A. 120-121. However, Ken Rhodes admitted being good friends with Bobby Holmes since the mid-eighties. J.A. 124-125. ROA 6429. He stated that he used to ride with Holmes. J.A. 126. He stated that he had also met his mother and father. J.A. 126. He stated the only person he had told was his wife. J.A. 129. At some point, he received a call from Holmes lawyers. Id. However, there was never any testimony that involved this particular crime, only that White ran with older women. J.A. 132.

Stephen Westbrook, another inmate, was the apparent star witness and attempted to develop admissions and conspiracies. He testified that in 1990 and again in 1994 Jimmy told him he had broken into the victim's house and raped her. Jimmy told Westbrook that deceased Officer Boot Smith had told Jimmy White to keep quiet about his guilt. J.A. 41-43.

Westbrook further testified that Officer Smith and Investigator Potts came to see Westbrook before Holmes's first trial and offered to get him out of jail if he would testify that Holmes had confessed to him. J.A. 43-44. Westbrook testified that in June 2000, about two months before this pretrial hearing, he was brought to Rock Hill from Kirkland Correctional Institute. He claimed that in Rock Hill, he was confronted by several employees of the solicitor's office who sought to convince him to testify against Holmes in the upcoming second trial. J.A. 45-46. Westbrook stated that the solicitor's office employees acknowledged to him that they had manufactured underwear evidence incriminating Holmes. J.A. 50. Westbrook also testified that Jimmy told him that Officer Smith was out to "frame" Holmes, and that even Holmes's former attorney had urged him to testify against Holmes. J.A. 44, 62-63. Finally, Westbrook testified an employee of the solicitor's office stated that, in addition to the manufactured underwear evidence, they had lifted one of Holmes's palm prints from the county jail door to use against him at trial. J.A. 50, 362.

On cross-examination, it was developed that prior statements he had given contained numerous inaccuracies and were not true in parts. J.A. 54-61, 64-65. In fact, Westbrook even asserted at one point that he just signed the statement and had not read it. J.A. 62-63, 65. It was developed that although he stated he knew Holmes "from around" that his family connections were so close that Holmes had put Westbrook's brother on his visitor list. J.A. 52, 54-55, 61-63. He acknowledged that in his statement and testimony he referred to different times. J.A. 63-64, 74. Some of the circumstances he described were physically impossible since White was not in custody at the stated time. J.A. 64-65.

4. Jimmy McCall White's Denials.

Jimmy McCall White testified at the pre-trial hearing. J.A. 74-93. In the prior statement he had given on April 2, 1980, White stated that he had gone with Junior Lytle and Michael Burkin to Clyde's about 10 p.m. He stated he left there at 1:30 a.m. on December 31, 1989 and arrived home at 2 a.m. In the statement, he said he got up that morning and went to Lytle's house and learned about some woman who was raped in York. J.A. 82-83. He denied the crime of either a rape or beating. 83. In his testimony. White stated that he had learned from Junior's father that he was denying that he gave White his ride home. White continued to assert that he left at around one. J.A. 86. He denied that he had made the statements to Westbrook, and Dixon. He denied going to the Public Defenders office or making that comment. J.A 89-90.[8]

5. The Exclusion of White In DNA Testing.

During the trial, the State proffered the testimony of a F. B. I. Agent Baechtel. After testing Jimmy White's specimen, i.e. a dried bloodstain, and comparing the specimen to the clothing items that were tested as part of the investigation, he determined that White was excluded as a contributor. J.A. 237-238.

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[8]The Petitioner contends that White incriminated himself with a false alibi by contending that he road with Joshua Lytle that morning to his home in Sharon. Although Lytle denied that White was in the car with him that night or morning and initially denied seeing White at any of Lytle's drinking stops, ROA 5946 - 47, later he conceded seeing White and that he had given a statement on April 7, 1990 that admitted seeing White at Clyde's that night, but "I drank a few beers, I can't remember much about tha. weekend." J.A. 19, 25. Nonetheless, taking the defense's view that Jimmy White lied about his alibi, this still has no other effect than to cast a bare suspicion on Jimmy White and even that is extremely tenuous. Again, as the trial court recognized this testimony does little more than support the proximity argument. J.A. 134.

The Trial Court's Rulings Denying Admission of the Proffer.

After the state had concluded its guilt phase case in chief, the trial judge again held that he was going to disallow the testimony holding that it could not come in under SCRE Rule 803 (b)(3) and Rule 801(d)(1)(a). ROA 3655. Relying upon State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999) and State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941) the court held that the statement lacked trustworthiness because there was no evidence that tends to clearly point out that Mr. White was guilty of the crime. J.A. 249-263, ROA 3655-56.

In his earlier written order after the pre-trial hearing on August 23, 2000, the trial court noted that although he had presented some testimony that White was in the proximity of Mary Stewart's apartment at a time when the victim was beaten, the alleged statements of White, the engine that "drives the train" under the Gregory standard, fell short of the indicia of trustworthiness lacking any details and where no forensic evidence links White to the crime.

The trial court found that there was no independent corroborating evidence of Jimmy White's alleged statements that he committed the beating and rape of Mary Stewart as required under the state supreme court's requirements in State v. Kinloch, 338 S.C. 385, 526 S.E.2d 705 (2000) interpreting South Carolina Rules of Evidence (SCRE), Rule 804(b)(3). Additionally, the court found at the time of the alleged statement made in the presence of Mattie Mae Scott, Jimmy White was, according to her, "intoxicated." The court found that none of the proffered testimony contains evidence, absent the statement itself, which would link White to the crime, other than information that from all the testimony appeared to have been common knowledge in the community, i.e. that an "old woman" had been beaten and raped in the early morning hours

and that Holmes had been tried, convicted and sentenced to death for the crime.[9] Thus, the indicia of reliability was not met. Under Kinloch, the court found that the statements of White were not admissible. J.A. 136-137.

The trial court then held that the exclusion of the alleged statements of Jimmy McCaw White, would leave not only the engine missing from the train, but resulted in there being absolutely no facts or circumstances which clearly point to Mr. White or anyone else as the person guilty of the beating and rape of Mary Stewart. Relying on Gregory, the motion to present evidence of third party guilt was denied. Judge Hayes deferred any issue as to impeachment until the trial. J.A. 133-138.

The South Carolina Supreme Court's Holding.

The South Carolina Supreme Court initially rejected the petitioner's claim concerning the admission of substantive third party guilt evidence and held that the proffer set out in State v. Gregory , 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) and State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001).[10] These standards required that admissible third party guilt evidence is limited to such facts that are inconsistent with the defendant's guilt and to such facts which raise a reasonable inference or

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[9]It found that none of White's statements contain any details of the crime and that no forensic evidence was offered linking White to the crime. White's alleged statements were general in nature and his presence in the general area during the time period in which the crime is alleged to have occurred, does not corroborate his alleged "confessions.

[10] The Holmes Court also cited the holding in State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001), that where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence.

presumption to his own innocence and more than conjecture or suspicion. In addition, there must be such proof of connection with it, such as a train of facts or circumstances , as clearly points out such other person as the guilty party. J.A. 364. Further, the court held that where there is strong forensic evidence of a defendant's guilt, the proffered evidence about a third party's guilt does not raise the necessary reasonable inference as to innocence to require the admission. Id. The appellate found concluded that the proffer was properly denied due to the strong forensic evidence of guilt pointing exclusively to Holmes. [11] The court summarily rejected appellate issue IV involving the disallowance of impeachment of certain police officers about the adequacy of their investigation about third party guilt, citing "State v. Johnson, 525 S.E.2d 519 (S.C.), *cert. denied,* 531 U.S. 840 (2000) (appellate court will not disturb trial court's ruling concerning scope of cross-examination of a witness to test his or her credibility absent manifest abuse of discretion); see also State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) (trial court erred by not

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[11] The court found that the strong evidence included: (1) Holmes's palm print was found just above the door knob on the interior side of the front door of the victim's house; (2) fibers consistent with a black sweatshirt owned by Holmes found on the victim's bed sheets; (3) matching blue fibers were found on the victim's pink nightgown and on Holmes's blue jeans; (4) microscopically consistent fibers were found on the pink nightgown and on Holmes's underwear; (5) appellant's underwear contained a mixture of DNA from two individuals, and 99.99% of the population other than appellant and the victim were excluded as contributors to that mixture; and (6) appellant's tank top was found to contain a mixture of appellant's blood and the victim's blood. The appellate court also concluded that other than the forensic evidence, there was evidence that Holmes matched the description of the perpetrator given by the victim and there was evidence that Holmes was fleeing from police officers and was in the area of the victim's house prior to the time she was attacked. The court also noted that White was excluded by the DNA testing done from being a contributor to any evidence connected to the scene.

admitting impeachment evidence after officer denied he had investigated two suspects different from the defendant; however, error found to be harmless)." J.A. 366-367.

SUMMARY OF THE ARGUMENT

This appeal must be dismissed as being improvidently granted where none of the federal constitutional claims were presented to the South Carolina Supreme Court. The Petitioner failed to raise the issues in the statement of the issues or in the initial brief before the court. The petitioner's conclusory sentences were insufficient as a matter of state procedure to preserve the issue for appellate review. The failure of the appellate court to cite to any federal constitutional claim in disposing of the issue and relying upon state evidentiary law alone reveals that the constitutional claims were not presented or addressed by the court. This procedural defect precludes jurisdiction in this court.

Where evidence of proffered third party guilt does not raise a reasonable inference of guilt toward the third party, due process is not denied by the exclusion of the evidence. The right to present evidence is not unlimited, but subject to reasonable restrictions. South Carolina's standards the admission of third party guilt evidence comports with similar practices in state and federal courts. Requiring the trial judge to make the determination on admissibility does not deprive a defendant of the right to a jury trial when he is unable to satisfy the reasonable inference showing tested against the entire circumstances of the case. Similarly, the rejection of unreliable evidence does not dilute the state's burden of proof beyond a reasonable doubt. South Carolina's rejection of the particular evidence in this case was consistent with the requirements of due process and the state evidentiary standards.

Even if the evidence should have been introduced, based upon a review if the entire record, the alleged deficiency is harmless beyond a reasonable doubt. The record before this court contains overwhelming evidence uniquely pointing to Holmes as the perpetrator to the exclusion of all others. The combination of the forensic evidence which excludes the third party and the evidence, direct and circumstantial, involving Holmes, conclusively suggest that the exclusion did not contribute to the verdict so as to require a new trial.

ARGUMENT

I. This Appeal Should Be Dismissed As Improvidently Granted Because Petitioner's Federal Claims Were Not Adequately Presented To The South Carolina Supreme Court.

It is well settled that this Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." Webb v. Webb, 451 U.S. 493, 496-497 (1981). "[I]t is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth." New York Central R. Co. v. New York, 186 U.S. 269, 273 (1902). "[P]assing invocations of 'due process' " that "fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment" do not "meet our minimal requirement that it must be clear that a federal claim was presented." Adams v. Robertson, 520 U.S. 83, 89, n. 3 (1997) (per curiam).

Former Chief Justice Rehnquist, in writing a dissent in Chambers, opined that the constitutional claims raised at that time on third party guilt had not been properly presented in the Mississippi court under its procedural rules. Chambers, supra.,

410 U.S., at 308-314 (dissenting opinion of Rehnquist, J.). Recognizing the limitations imposed by Congress upon the Court's authority to review judgments of state courts as a jurisdictional limitation, he recognized that the constitutional claim must be brought to the attention of the state court "with fair precision and in due time", citing Street v. New York, 394 U.S. 576, 584, n.3 (1969). He reiterated that "even the most lenient construction of 28 U.S.C. § 1257 that requires that the title, right privilege or immunity' be 'specially set up or claimed' could not aid petitioner that this point properly raised a federal constitutional issue." Id., 410 U.S. at 313.

It is extraordinarily doubtful that the South Carolina appellate court would ignore its own procedures and expand its consideration to unarticulated federal constitutional claims which were never specifically presented to in the briefing before that court when the Petitioner was arguing his issues in reliance on state evidentiary law and standards. Simply put, there is no showing that Holmes ever raised these particular constitutional claims related to the exclusion of evidence in the guilt phase of his trial in his direct appeal to the South Carolina Supreme Court. This Court lacks subject matter jurisdiction to consider this particular challenge to the guilt phase presentation and certiorari must be dismissed as improvidently granted.

The Petitioner asserts, for the first time before this Court, that the state trial court's application of the evidentiary standard of State v. Gregory, 198 S.C. 98, 165 S.E.2d 532 (1941) during the guilt phase of his trial violates the constitutional mandates in Chambers v. Mississippi, 410 U.S. 284 (1973) because it allegedly creates a *per se* exclusion of third party guilt evidence where the prosecution case is "strong." This federal constitutional challenge to the existing state evidentiary test was never raised in *any* challenge to the guilt phase evidence before the Supreme Court of South Carolina. In fact, Chambers v. Mississippi, 410 U.S. 284

(1973) was *never* cited in the Final Brief of Appellant on the guilt phase issues where they relied solely on reference to state evidentiary law and rules to support the admission. See *Final Brief of Appellant*, pp. 7-30, *Final Reply Brief of Appellant*, pp. 5-19.[12] To the contrary, Holmes claimed that the standard set out in State v. Gregory was the appropriate test for the court to consider the admission of this evidence. *Final Brief of Appellant, pp. 9, 18, 30. Final Reply Brief of Appellant*, p. 10. Also, Holmes cited the earlier decision of State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001) in support of his position on admissibility. *Final Brief of Appellant*, pp. 17, 19; *Final Reply Brief of Appellant*, pp. 9. Conclusively, in the petition for rehearing before the Supreme Court of South Carolina, Holmes again stated that the evidence was admissible under "the Gregory and Gay standard." *Petition for Rehearing*, p. 2. Unlike his presentation in this Court, no particular reference was made to any federal constitutional violation concerning the *Gregory-Gay* standard in the appellate pleadings challenging the exclusion of the guilt phase evidence in the appeal.

Since the Petitioner contended that the Gregory - Gay analysis was the appropriate guilt phase evidentiary standard in the state court, he has not preserved his right to challenge the use of these standards in this Court. As revealed in the *Final Brief of Appellant*, the guilt phase evidentiary issues raised were solely based upon state evidentiary law and its applicability to the various offers of third party guilt evidence suggested by Holmes.

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[12] The only guilt phase citation to any non-South Carolina evidentiary cases was a passing reference to Chambers in a footnote in the *Final Reply Brief of Appellant, p. 10, n. 11*. However, in that setting, Chambers was cited as support for the corroboration requirement of SCRE Rule 804(b)(3), not as a federal constitutional challenge to the state evidentiary standard.

The Court has stated many times that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary." R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* 175 (8th ed. 2002), citing Street v. New York, 394 U.S. 576, 582(1969); Chicago, I. & L.R. Co. V. McGuire, 196 U.S. 128, 131-33 (1905).

The constitutional claims sought to be asserted in this proceeding were never properly presented to the South Carolina Supreme Court for its consideration under its state appellate rules and procedures in the "statement of issues" within the brief or the brief itself. Because of these deficiencies, these claims were never ruled upon by the South Carolina Supreme Court. Rule 208(b)(1)(B), SCACR, requires an appellant's initial brief to contain "[a] statement of each of the issues presented for review." "[O]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal." In the Statement of Issues On Appeal in the Final Brief of Appellant, Holmes made only general statements without any specification to the federal constitution. Chief Justice Toal and her co-authors write in their work *Appellate Practice in South Carolina* that "where an issue is not specifically set out in the statement of issues, the appellate court may nevertheless consider the issue if it is reasonably clear from appellant's arguments." Toal, et al. *Appellate Practice In South Carolina* 75 (2d ed.2002). Sullivan Co., Inc. v. New Swirl, Inc., 313 S.C. 34, 437 S.E.2d 30. (S.C. 1993).

In South Carolina, for issue preservation, assuming the "statement of the issue" is sufficient, the issue must also be argued fully in the initial brief of appellant to be preserved for the Court's consideration. State v. Tyndall, 336 S.C. 8, 518 S.E.2d 278 (Ct. App. 1999) (brief conclusory statement

inadequate to preserve issue); First Savings Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994) (issues not argued in the brief are deemed abandoned and will not be considered on appeal).

Holmes' belated attempt in his *Final Reply Brief* in the state appellate court to incorporate the penalty phase constitutional claims in the initial brief did not preserve those issues as a matter of state law for either the South Carolina Supreme Court or ultimately this Court. First, he ignores his own statement in state court that "evidence introduced during the penalty phase of a criminal trial is not held to the same evidentiary standards utilized at the guilt-or-innocence phase." *Final Brief of Appellant*, p. 38. Second, this attempted incorporation was inadequate as a matter of state appellate procedure, to preserve for appellate consideration specific federal constitutional not identified in the initial brief (or statement of the issues). See, Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct.App.1993) (holding that failure to provide argument or supporting authority for an issue renders it abandoned).

In the authoritative work on appellate practice in South Carolina authored by Chief Justice Jean Toal, it states that an appellant may not use the reply brief to argue issues not argued in the initial brief. Toal et al., *Appellate Practice in South Carolina* 75-76 (2d. ed. 2002). Caselaw supports this proposition of state appellate practice. Bochette v. Bochette, 300 S.C. 109, 386 S.E.2d 475 (Ct.App.1989); Glasscock, Inc. v. United States Fidelity and Guar. Co. , 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001)(An argument in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief). Therefore, the passing reference to Chambers in that brief was also inadequate.

The conclusory references to the Constitution in the final sentence of each argument in the Final Brief of Appellant is insufficient to preserve jurisdiction for certiorari in this Court. See, *State v. Holmes, Final Brief of Appellant*, pp. 19, 22, 26, 30. Mere conclusory reference to the constitution cannot be deemed adequate to create jurisdiction in this Court. See, Herndon v. Georgia, 285 U.S. 441, 442-43 (1935); Bowe v. Scott, 233 U.S. 658, 664-65 (1914) ("due process of law" insufficient); Howell v. Mississippi, 543 U.S. 440 (2005) (per curiam) (petitioner's federal constitutional claim was not properly raised before the state court because "he did not cite the Constitution or even any cases directly construing it, much less any of this Court's cases"). 28 U.S.C. Section 1257 requires that federal law challenges to state law decisions be "addressed by or properly presented" to the state court before the Supreme Court may hear the case. Id. at 860. In Beck v. Washington, 369 U.S. 541, 553 (1962), the Court found the waiver of a constitutional claim that was merely mentioned in one sentence in the 125 page brief in the state court.

The similar failure to meet these minimum standards by Holmes in the South Carolina Supreme Court bars consideration of his federal constitutional question presented here.[13] First, as acknowledged by the Petitioner in his merit brief at page 20, the South Carolina Supreme Court in its opinion "analyzed the matter solely as an issue of state law" and never addressed any federal constitutional claim or analysis in disposing and rejecting the state law evidentiary issue. Second, none of the required "statement of the issues" referenced the federal constitution, any amendment, or the

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[13] The Respondent acknowledges that Holmes did make reference to Chambers in his presentation on the failure to admit the evidence in the penalty phase. *Final Brief of Respondents, pp. 38-43.* However, a review of the petition before this Court reveals the current issue is solely on the guilt phase evidence issue, not the penalty phase.

constitutional right to a jury, right to present a defense, or constitutional right to confront his accusers. Third, the initial (and final) brief of appellant never articulated the basis of any particular constitutional violation implicated in the exclusion of the evidence related to Jimmy White in the guilt phase and only attacked its exclusion under a state evidentiary law analysis. Fourth, Holmes never contended in any state appellate court briefing that the Gregory - Gay standard concerning the admission of third party guilt evidence was a violation the federal constitution generally, or specifically the right to a jury trial and the right to confront his accusers. To the contrary, Holmes relied on both cases in his brief before the Court to assert the exclusion of the evidence was in error as a matter of state evidentiary law. Fifth, the passing reference to Chambers in the reply brief was not sufficient to preserve the issue. Finally, Holmes' petition for rehearing, similarly did not invoke any particularized constitutional claim concerning the exclusion of the evidence. See, *Petition for Rehearing*, November 15, 2004. See Radio Station WOW v. Johnson, 326 U.S. 120, 128 (1945).

Given Holmes failure to ever suggest to the state appellate court the Gregory-Gay test for the admission of the evidence violates either the right to a jury trial, the right to present a defense, or reduce the prosecutions burden of proof, it is no surprise that the state court considered the claim solely as a matter of state law. Jurisdiction within this Court under 28 U.S.C. Section 1257 is lacking.

II. The South Carolina Supreme Court's Application Of Its State Evidentiary Standard In Denying The Admission of Third Party Guilt Evidence Concerning Jimmy McCaw White Was Appropriate Where The Evidence Did Not Rise To The Level of Trustworthiness Necessary To Establish Its Admissibility Since The Proffered Evidence Did Not

Raise A Reasonable Inference or Presumption As To His Own Innocence.

A. The right to present relevant evidence in his defense is not unlimited, but subject to reasonable restrictions.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " Crane v. Kentucky, 476 U.S. 683, 690 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)).A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions. See Taylor v. Illinois, 484 U.S. 400, 410 (1988); Rock v. Arkansas, 483 U.S. 44, 55 (1987); Chambers v. Mississippi, 410 U.S. 284, 295 (1973). A defendant's interest in presenting such evidence may thus " 'bow to accommodate other legitimate interests in the criminal trial process.' " Rock, supra, at 55 (quoting Chambers, supra, at 295); accord, Michigan v. Lucas, 500 U.S. 145, 149 (1991). However, that right is not unlimited. "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " United States v. Scheffer, 523 U.S. 303, 308 (1998) (quoting Rock v. Arkansas, 483 U.S. 44, 56 (1987)) (emphasis added). "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, [evidentiary rules] may not be applied mechanistically to defeat the ends of justice." Chambers, 410 U.S. at 302. The Supreme Court has "found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty

interest of the accused." Scheffer, 523 U.S. at 308. See Rock, supra, at 58; Chambers, supra, at 302; Washington v. Texas, 388 U.S. 14, 22-23 (1967).

In Chambers v. Mississippi, 410 U.S. 284 (1973), the Court was confronted with a defendant's inability to introduce evidence that a third person had repeatedly confessed orally to committing the murder with which the defendant was charged. When Chambers was tried, the Mississippi Rules of Evidence did not recognize an exception to the hearsay rule for declarations against penal interest and adhered to the common law "voucher rule." The Supreme Court held that the exclusion of the evidence constituted a violation of the Due Process Clause of the Fourteenth Amendment. In Chambers, the Court explicitly noted that the third party's confessions "were originally made and subsequently offered at trial under circumstances that provided considerable assurances of their reliability." *Id.* at 300. The third party confessed to three different individuals. The confessions were made spontaneously and to close acquaintances shortly after the murder occurred. The confessions were corroborated by substantial independent evidence. The declarant did not stand to benefit from disclosing his role in the murder, and the declarant was present in the courtroom and could have been cross-examined under oath. *Id.* at 300-01.

The Court briefly noted that a rationale for the rule against hearsay is to exclude untrustworthy testimony. *Id.* at 298. Where the testimony bears persuasive assurances of trustworthiness and the testimony is exculpatory in nature, the hearsay rule should "not be applied mechanistically to defeat the ends of justice." *Id.* at 302. Accordingly, Chambers effectively held that stringent application of the rule against hearsay may violate fundamental standards of due process when the rule is applied mechanistically and in a manner precluding introduction of statements against penal interest that

are both reliable and "directly affecting the ascertainment of guilt." *Id.*

The crux of Chambers is that a defendant has a fundamental right to present *reliable* evidence of a third party's confession to a crime for which the defendant is being tried. Evidence of a spontaneous confession by a third party that is corroborated by direct evidence satisfies a showing of "particularized guarantees of trustworthiness" and is sufficiently reliable to be admissible as an exception to the rule against hearsay. It is error therefore to apply rules of exclusion without regard to the particular circumstances of the case or reliability of the evidence, and without regard to the trial court's discretion.

Chambers is but one of several Supreme Court decisions dealing with state rules of evidence used to reject a defendant's evidence on "mechanistic" grounds. In Green v. Georgia, 442 U.S. 95 (1979), the Court again reversed a conviction where the Georgia courts had rejected hearsay statements on the ground that Georgia did not recognize the penal interest exception to the hearsay rule. An earlier case, Washington v. Texas, 388 U.S. 14 (1967), involved Texas statutes which prohibited persons charged or convicted as co-participants in a crime from testifying for each other, though they could testify for the State. Washington's proffer of testimony tended to show that Washington was not the shooter. The evidence was rejected pursuant to the Texas statutes. The Supreme Court reversed the conviction on the grounds that the State's rule "arbitrarily" deprived Washington of his right under the Sixth Amendment to present witnesses in his defense. In Rock v. Arkansas, 483 U.S. 44 (1987), the Court held that a state could not "arbitrarily or disproportionately" prevent a defendant from testifying in her defense by implementing a per se rule prohibiting hypnotically enhanced testimony.

These cases, taken together, stand for the proposition that states may not impede a defendant's right to put on a defense by imposing mechanistic (Chambers) or arbitrary (Washington and Rock) rules of evidence. But they do not stand for the proposition that a defendant must be allowed to put on any evidence he chooses. As the Court said in Chambers:

> Few rights are more fundamental than that of an accused to present witnesses in his own defense. In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.

410 U.S. at 302 (citations omitted). See also Crane v. Kentucky, 476 U.S. 683, 690 (1986) ("[W]e have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability-even if the defendant would prefer to see the evidence admitted.").

Here, Jimmy White's statements were not excluded as a result of an application of mechanistic rules of admissibility. Rather, after analyzing the proffer and the corroborating and contradictory circumstances, the state court determined that the White's alleged statements were not sufficiently reliable to warrant its introduction. Thus, the refusal to admit the proffer did not run afoul of the Chambers-Washington-Rock prohibition against arbitrary and mechanistic exclusion of exculpatory evidence.

The Court has reasserted that there is no *per se* constitutional bar against the exclusion of testimony for failure to comply with discovery rules, specifically the notice

provisions of Michigan's rape-shield law. See Michigan v. Lucas, 500 U.S. 145, 153 (1991). The Court stated generally that "[r]estrictions on a criminal defendant's right[ ] ... to present evidence 'may not be arbitrary or disproportionate to the purposes they are designed to serve.' " Id. at 151 (quoting Rock v. Arkansas, 483 U.S. 44, 56 (1987)). But because exclusion could be justified in certain circumstances, the Supreme Court remanded to the state court (which had found a *per se* bar against exclusion) to reevaluate the exclusion in context. *Id.* at 153.

The Petitioner maintains that he was denied the opportunity to present a defense pursuant to Chambers because the unreliable evidence was excluded. The Petitioner, however, fails to recognize the limited application of Chambers articulated in subsequent Supreme Court decisions. In Montana v. Egelhoff, 518 U.S. 37, at 53 (1996), a plurality of the Court recognized that noted the limited application of Chambers to its own facts. *Id.* at 53.

Egelhoff was before the Supreme Court on direct appeal from a Montana criminal conviction. Montana had a law that said a defendant's intoxicated condition could not be admitted to cast doubt on whether he possessed the mental state required as an element of the crime charged. The Montana Supreme Court reversed Egelhoff's conviction, saying that his rights under the Due Process Clause were violated by the statutory exclusion of evidence; the court said he had a right to have the jury consider all relevant evidence to rebut the State's evidence and his intoxicated state was relevant to the issue whether he acted knowingly and purposely. The United States Supreme Court reversed. While noting that Chambers and Crane v. Kentucky, 476 U.S. 683 (1986), say that in the absence of a valid state justification, exclusion of evidence may deprive a defendant of due process, the Court emphasized that a defendant does not have an unfettered right to present evidence, even relevant evidence. Citing Patterson v. New York, 432

U.S. 197 (1977), the Court pointed out that, within reason, states may regulate procedures under which their laws are carried out. Furthermore, the Due Process Clause does not permit federal courts to "engage in a finely tuned review of the wisdom of state evidentiary rules." Id., at 43, quoting Marshall v. Lonberger, 459 U.S. 422 (1983). The Court upheld the Montana law: "[T]the introduction of relevant evidence can be limited by the State for a 'valid' reason." Egelhoff, 518 U.S. at 53.

The limitation on Chambers was subsequently confirmed by an eight-Justice majority, excluding Justice Stevens, in United States v. Scheffer, 523 U.S. 303 (1998). In Scheffer, eight Justices agreed that "Chambers specifically confined its holding to the 'facts and circumstances' presented in that case." 118 S.Ct. at 1268. Even after Chambers, states remain free to fashion rules evidence requiring exclusion of evidence under certain standards.

In Scheffer, the Court revisited the issue of balancing the defendant's right to present a defense against the state's right to prevent unreliable evidence. Scheffer held that a *per se* ban on polygraph evidence did not unconstitutionally constrain a defendant's right to present exculpatory evidence. 523 U.S. at 317. Scheffer distinguished Washington and Rock. The Court noted that the exclusions of evidence in those cases "significantly undermined fundamental elements of the defendant's defense." Id. at 315. Specifically, Scheffer held that barring the admission of an allegedly exculpatory polygraph test did not do so, id. at 309, and it contrasted the polygraph limitation with the preclusions on the testimony of a percipient witness and the testimony of the defendant, respectively, in Washington and Rock, id. at 315-16. The distinction between Washington, Rock, on the one hand, and Scheffer, on the other, is this: In the former, a trial court prohibited presentation of the substantive content of a defendant's testimony or a percipient

witness' testimony, id. at 315, while in the latter a trial court prohibited something much less direct, and much more within the jury's province--third-party evidence of the truthfulness of the substantive content of the defendant's testimony. Id. at 315-16.

Because it is clear that the application of Chambers should be limited to the facts of that case when applied to issues involving hearsay evidence, this Court would have to examine the facts of that case. Chambers involved the impact of Mississippi's voucher rule. Such a *per se* exclusionary standard is not involved in this case where the reliability and corroboration of testimony was the touchstone of the state court's Gregory analysis. In Chambers , the Court went through numerous factors that supported persuasive assurance of trustworthiness concerning the hearsay statements. The South Carolina Supreme Court and trial court analyzed the proffer and the entirety of the case and resolved that the testimony was unreliable against the strong evidence of guilt which the inadmissible evidence did not confront. This reasoned analysis is consistent with Chambers. The standard in South Carolina does not create a *per se* exception to third party guilt evidence, only an exception to unreliable evidence suggesting third party guilt. The failure to admit was not constitutional error.

A criminal defendant "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Chambers, 410 U.S. at 302. For example, a criminal defendant does not have a constitutional right to present evidence that is "incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Montana v. Egelhoff, 518 U.S. 37, 42 (1996) (plurality opinion). And even otherwise admissible evidence may be excluded as a sanction for the defendant's failure to comply with a valid discovery order. See Taylor, 484 U.S. at 414-417; United States v.

Nobles, 422 U.S. 225, 241 (1975). Although the Constitution guarantees a criminal defendant's right to present a defense, it does not guarantee that a jury will hear all of the evidence—or even all of the *relevant* evidence—that he wishes to present. Egelhoff, 518 U.S. at 42.

B. South Carolina's Standards For The Admission of Third Party Guilt Evidence Comport With Evidentiary Practice In Other Jurisdictions.

Holmes contends that the South Carolina standards governing the admission of third party guilt evidence are "idiosyncratic" and therefore suspect in its use. Contrary to that characterization, South Carolina practice is consistent with the practice in other jurisdictions which require sufficient reliability and a connection to the crime charged. In the Holmes opinion, the South Carolina Supreme Court stated the following standard arises from its 1941 holding in State v. Gregory, citing 16 C.J. 560. The court determined that the evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible. The state court further stated that before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on

trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty. J.A 364.

These requirements, evolved from the commentators, are not unique to South Carolina. *22A C.J.S. Criminal Law* § 729 (1989); *40A Am Jur 2d Homicide § 349* . The *amicus curiae* brief in support of the Respondent has documented the practices in the various states and federal jurisdictions. Federal courts have consistently held that third-party-guilt evidence is not admissible unless it bears a sufficient connection to the specific crime charged. E.g., Wade v. Mantello, 333 F.3d 51, 57-62 (2d Cir. 2003); DiBenedetto v. Hall, 272 F.3d 1, 7-9 (1st Cir. 2001); Guam v. Ignacio, 10 F.3d 608, 615 (9th Cir. 1993); Glaze v. Redman, 986 F.2d 1192, 1195-1197 (8th Cir. 1993); Cikora v. Dugger, 840 F.2d 893, 897-898 (11th Cir. 1988). Most State courts have held that third-party-guilt evidence is not admissible unless it bears such a connection to the charged offense that it suggests the innocence of the accused. E.g., People v. Arline, 13 Cal. App. 3d 200, 203 (Cal. Ct. App. 1970)(stating that there were no facts to "connect [the third party] with the crime"); State v. Giguere, 439 A.2d 1040, 1043 (Conn. 1981)("We have stated: 'Ordinarily, evidence concerning a third party's involvement is not admissible until there is some evidence which directly connects that third party with the crime.'"). See also State v. Koedatich, 548 A.2d 939, 978- 79 (N.J. 1988)(collecting state and federal cases admitting and excluding evidence based on the existence or nonexistence of a "link" or "connection" between the "third party and the victim or the crime"). In People v. Schultz, 4 N.Y.3d 521 (N.Y. 2005), the court, like South Carolina, held that before such testimony can be received, there must be "proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party." E.g., State v. Larsen, 415 P.2d 685 (Idaho 1966) (same); State v. Downs, 13 P.2d 1 (Wa. 1932) (same).

One state requires proof of an overt act by the third party before evidence of third party guilt is admissible. Gore v. State, 119 P.3d 1268 (Okla. 2005). Some States require that the proffered evidence point directly to the third party's guilt. See Shields v. Arkansas, 166 S.W.3d 28 at 32 (Ark. 2004). Other States require that the proffered evidence raise a reasonable doubt as to the defendant's guilt. E.g, People v. Harris, 118 P.3d 545 (Cal. 2005); People v. Conlogue, 474 A.2d 167, 172 (Me. 1984)(evidence tending to implicate another person, and deflect guilt from the defendant, must be admitted if it is of sufficient probative value to raise a reasonable doubt as to the defendant's culpability"). Some states require the evidence to "raise a reasonable inference of the defendant's innocence." E.g., Carr v. State, 612 S.E.2d 292 (Ga. 2005). Some courts use the Federal Rule of Evidence Rule 401 or the state equivalent and the principal of relevancy to determine admissibility. Commonwealth v. Scott, 564 N.E.2d 370 (Mass. 1990)(upholding the exclusion of evidence that others committed the charged crime on relevancy grounds). Others apply a combination of all three. State v. Caulk, 718 P.2d 99 (Cal.1986).

Some jurisdictions recognize that the breadth of the state's evidence is a factor on whether the conditions for the admission of evidence have been satisfied. In Kansas v. Adams, 124 P.3d 19 (Kan. 2005), the court recognized the probative power that the "wealth of evidence," both direct and circumstantial, against the defendant had in its determination on whether evidence of third party guilt should be admitted. In Glaze v. Redman, 986 F.2d 1192 (8th Cir. 1993), the court in a habeas corpus action arising from Minnesota upheld the rejection the admission of third party evidence based upon the state court conclusion there was overwhelming evidence of the defendant's guilt .

The Petitioner and the amicus curiae essentially are asking for this Court to make uniform evidentiary standards for the admission of third party guilt evidence upon the states. They recognize that courts apply varying standards to admission of this evidence. They contend that this variety of evidentiary tests breeds confusion in the admission of the evidence, particularly when the state courts regularly do not cite any federal authority for their standards. The argument, pared down, seems to be a request that the Court fashion general evidentiary rules, under the guise of interpreting the Due Process Clause, which would govern the admissibility of evidence at state criminal trials. The Supreme Court has not done so in the past, however, and should not do so today. The Federal Constitution does not establish a federal code of evidence to supersede state evidentiary rules in state court trials. Romano v. Oklahoma , 512 U.S. 1, 12 (1994) Cf. Payne v. Tennessee, 501 U.S. 808, 824-825 (1991); Blystone v. Pennsylvania, 494 U.S. 299, 309 (1990).

"[P]reventing and dealing with crime is much more the business of the States than it is of the Federal Government, and ... we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out,' ... and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " Patterson v. New York, 432 U.S. 197, 201-202 (1977) (("[W]e should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States"); Marshall v. Lonberger, 459 U.S. 422, 438, n. 6 (1983) ("[T]he Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules"). "It has never been thought that [decisions

under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure." Spencer v. Texas, 385 U.S. 554, at 564 (1967).

Requiring that a defendant's proffered evidence suggest the third party's sole culpability in the charged offense to such a degree that a juror reasonably could doubt the defendant's guilt is not a unique practice to South Carolina. Holmes has not shown that he is deprived of a "fundamental principle of justice." Egelhoff, 518 U.S. at 43. The purported right of a criminal defendant to present third-party-guilt evidence that does not have a legitimate tendency to prove, or cannot raise a reasonable inference of, the defendant's innocence is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Patterson, 432 U.S. at 202. These decisions thus further demonstrate that South Carolina's rule is fully consistent with the requirements of due process.

C. The South Carolina standard for admissibility does not deprive the defendant of his constitutional right to a jury trial.

The Petitioner contends that the determination by the judge, as opposed to the jury, on the admission of the third party guilt evidence deprived him of him constitutional right to a jury trial. His attempt to create a new constitutional requirement that juries, not judges, make threshold determinations on the admission of such evidence is unsound and not supported by the prior precedent of this Court. "Questions of the admissibility of evidence are for the determination of the court; and this is so whether its admission depend upon matter of law or upon matter of fact." Gila Valley, Globe, & N. Ry. Co. v. Hall, 232 U.S. 94, 103 (1914). As this Court has recognized, the "normal rule that the admissibility of evidence is a question for the court rather than the jury." Lego

v. Twomey, 404 U.S. 477, 490 (1972). In South Carolina, as in other jurisdictions, the admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 564 S.E.2d 87 (S.C. 2002). In State v. Gregory, 16 S.E.2d 532 (S.C. 1941), the Court stated:

> At the outset we repeat the time-honored tenet that ordinarily the conduct of a trial, including the admission and rejection of proffered testimony, is largely within the sound discretion of the trial Judge and his exercise of such will not be disturbed by this Court on appeal unless it can be shown that there has been an abuse of discretion, a commission of legal error in its exercise, and that the rights of the appellant have been thereby prejudiced.....The situation seems to us to have been one peculiarly appropriate for the exercise of discretion as to admissibility of evidence and to guard against the confusion of the jury by the injection of collateral issues.....

Gregory, 16 S.E.2d at 534. A review of the decisions concerning the admission of evidence on third party guilt reveals the plethora of jurisdictions correctly give trial judges the discretion and authority to exclude evidence that lacks the proper indicia of trustworthiness, is incompetent or is unreliable and would lead to jury confusion and an unreliable verdict. Relevant evidence may be excluded for undue prejudice even though no specific exclusionary rule requires exclusion. State v. Alexander, 401 S.E.2d 146 (S.C. 1991). 1

WIGMORE, EVIDENCE § 10a (Tillers rev.1983). See also SCRE, Rule 403.[14]

In Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589 (1993), the Court discussed the gatekeeping function of the trial judge in screening expert opinion to ensure it is reliable before its submission to the jury. In Lego, the Court limited the admission of evidence of confessions to "only those confessions that he reliably found, at least by a preponderance of the evidence, had been made voluntarily. " 404 U.S. 484-487. In Huddleston v. U.S. 485 U.S. 681, 690 (1988), the court recognized the responsibility to determine whether a condition has been fulfilled under FRE Rule 104(b) and required the judge to examine all the evidence in the case and decide whether the jury could reasonably find the conditioned fact by a preponderance of the evidence." [15]

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[14]Rule 104(a) of the Federal Rules of Evidence states that "preliminary questions concerning ...the admissibility of evidence shall be determined by the court." Cases that involve the constitutionality of admission or exclusion of evidence at trial have routinely focused on the trial court's role in determining the admissibility of evidence. E.g., Old Chief v. United States, 519 U.S. 172, 180 (1997) (the trial court's discretion to exclude evidence under Fed. R. Evid. 403); Bourjaily v. United States, 483 U.S. 171, 175 (1987) (defining the standard of proof for facts necessary to the trial court's determination whether a hearsay exception applies). As the Court has explained, "[e]vidence is placed before the jury when it satisfies the technical requirements of the evidentiary [r]ules, which embody certain legal and policy determinations." Bourjaily, 483 U.S. at 175.

[15] Court routinely make preliminary rulings as to the admission of evidence. U.S. v. Smithers, 212 F.3d 306 (6th Cir. 2000)(court improperly failed to weigh the Daubert factors); U.S. v. Valasquez, 64 F.3d 844 (3rd Cir. 1995)(court must make preliminary determination concerning expert testimony to guarantee relevance and reliability of expert testimony); U.S. v Sears, 663 F.2d 896 (9th Cir. 1981) (court must hold hearing prior to admitting admission by silence). Where a claim of privilege

The gatekeeping function of the trial judge with the admission of evidence is well founded. As noted above, certain circumstances may exist which despite relevance, would induce a jury verdict on a purely emotional basis, at one extreme, to nothing more harmful than wasting time at the other. These evidentiary determinations do not divest the party of the right to a jury trial, but ensures the right to a reliable, fair and impartial trial.

It is suggested that the gatekeeping function performed in South Carolina deprives the defendant of his right to a trial by jury because the jury is not tasked with determining the credibility and reliability of the evidence when its exclusion is based upon the strength of the state's case. Particularly, he contends that an entire category of evidence will be excluded because the trial judge is convinced of his guilt. The Petitioner misreads the limitation in the South Carolina practice. The defendant was tasked with creating a reasonable inference of his innocence in light of all the circumstances of the case. These circumstances would necessary include the consideration of state's case, because that consideration as with all evidentiary consideration on relevant evidence cannot be made in a vacuum.

Contrary to the claims of the Petitioner, there is not a "category" of cases that the standard excludes. Rather it

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on the ground of state secrets is made , the trial judge will evaluate the respective interests of the government and the opponents. U.S. v. Nixon, 418 U.S. 683 (1974). As noted in FRE Rule 403, the trial judge is frequently tasked with the determination to conduct balancing test between probative and prejudicial value. See U.S. v. McRae, 593 F.2d 700 (5th Cir. 1979) (Rule 403's major function is to exclude evidence of slight probative value dragged in by the heels for the sake of prejudicial effort).

mandates a cases by case evaluation, as in any evidence case of the probative value versus prejudicial effect - nothing more and nothing less.[16] The South Carolina standard insured that where the proffered evidence did gave rise to a reasonable inference that someone other than the defendant actually committed the charged offense, it would be admitted as evidence based upon a review of the entire record. Certain circumstances, such as existed in the Holmes case, may arise where the connection of the third party to the case is not adequately shown by any reasonable inference. The fact that forensic evidence uniquely tied the petitioner to the crime was a strong factor in showing that Holmes had not met his burden of production. The same forensic material excluded the third party as a contributor. In contrast, where the proffered evidence did not give rise to a reasonable inference that someone other than the defendant actually committed the charged offense, it would not be admitted as evidence. When the proffer is unable to overcome independent evidence uniquely pointing to the defendant and excluding any other third party, the task upon the proponent is more difficult to satisfy, but the court is always tasked with the individual consideration of the evidence and its relative strengths.

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[16]The concern xpressed about the feasibility of the pretrial hearing in South Carolina is a red herring. First, as a matter of South Carolina practice the hearing is in the form of a motion in limine and not final. In most cases, making a motion *in limine* to exclude evidence at the beginning of trial does not preserve the issue for review because a motion *in limine* is not a final determination. State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001); State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996). Second, that was acknowledged by the Petitioner in this case who renewed his motion as the evidence developed during the trial. Whether the prosecution previews its case in the motion *in limine* would be a function of th trategy in the case. The initial determination as with all evidentiary issues in South Carolina would be subject to the development of the trial.

D. The South Carolina Rule Did Not Reduce The Prosecution' s Burden To Prove Guilt Beyond A Reasonable Doubt.

In contending that the rule of evidence reduces the prosecution burden of proof beyond a reasonable doubt. Under In re Winship, 397 U.S. 358, 363-64 (1970), due process requires that the government prove every element of a criminal offense beyond a reasonable doubt. As the Court later noted in Lego v. Twomey, 404 U.S. 477 (1972), however, Winship "was not concerned with the standards for determining the admissibility of evidence"; rather, Winship merely affirmed the necessity for the prosecution, in order to secure a conviction, to prove every essential element of the offense beyond a reasonable doubt. The fact that there is a burden of production placed upon the defendant for the admission of certain evidence does not create the risks Petitioner now associates with this standard. Equating this evidentiary standard with the deprivation of a jury trial of the facts under Apprendi v. U.S., 530 U.S. 466 (2000), is a remarkable stretch of the constitutional fabric. Nothing removes any factual proof the state must show to convict Holmes. His rhetorical suggestion otherwise must be rejected.

Here the trial court's decision to exclude the third party evidence was purely an evidentiary ruling, not a decision on Holmes' substantive guilt. The Petitioner acknowledges that the rule does not alter the prosecutions burden of proof, but suggests that it allows the state meet the burden of overcoming the prosecution's evidence to get its own competent and relevant evidence before the jury. However, the question bootstraps the answer because the burden placed upon the petitioner was to show the evidence was "competent and relevant exculpatory evidence" by meeting the burden, similar to burden established for other evidence of third party guilt. His complaint is that he lacked the proof to overcome in this setting

the particular strong evidence of forensic guilt in his case. This showing did not lessen the state burden of proof in any manner. Like any other preliminary evidentiary burden of showing competent and relevant probative evidence, the failure on the part of a proponent does not lessen the burden of proof the state must meet. Failing to meet a reasonable inference that clearly points to White as the guilty party, Holmes cannot complain that the state's burden was lightened.

E. The Limitation On The Scope Of Cross-Examination Did Not Violate The Sixth Amendment Where It Was Not Impeachment But An Attempt To Introduce Substantive Third Party Guilt Evidence And Conjecture.

The right to a meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accusers. This does not mean, however, that trial courts conducting criminal trials lose their usual discretion to limit the scope of cross-examination. On the contrary, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986).

Holmes contends that he should have been able through cross-examination to challenge police witnesses credibility and good faith in their investigations by questioning them on the extent that they followed-up in their investigation concerning Jimmy White as a potential suspect, rather than filing charges against Holmes. On appeal, he asserted that this should have been admissible under SCRE Rule 611(b). Holmes proffered his cross-examination of Chief Mobley at J.A. 198-202. The

Court denied his right to inquire of Chief Mobley at that time concerning the investigation of White, particularly as to whether he took White's clothes and shoes into evidence, tht he did draw blood and take White's fingerprints, that White had longer hair than Holmes at that time , but denied that during the early course of the investigation , he had been advised that White was in the area of the incident. J.A. 198-199. The trial court rejected that this evidence was "impeaching" evidence, but concluded that instead it was being presented as evidence of third party guilt which had precluded. J.A. 200-201.

Contrary to the assertions in their brief, the proffer did not include any inquiry about whether he was aware that multiple witnesses had said White has confessed about attacking Ms. Stewart or whether White more closely matched the description of the perpetrator than Holmes, or whether White had a more violent streak than Holmes. The petitioner's speculation about this area is not preserved, particular where no proffer has been made of what the responses would have been from Captain Mobley.

The state court determined summarily that the trial judge did not abuse his discretion in denying the admission. J.A. 366. In addition, relying on State v. Beckham, 513 S.E.2d 606 (S.C. 1999), the Court concluded that alternately that any error in not introducing the impeachment evidence was harmless error. Violations of the confrontation clause of the Sixth Amendment are subject to harmless error analysis. Delaware v. Van Arsdall, 475 U.S. 673 (1986)("[W]e hold that the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to Chapman harmless-error analysis."). As set forth below, any alleged error must disappear with the limited impact of the proffered questions when substantive third party guilt was not otherwise admitted and would only have sought to have confused the

juror on the specific proffer. Any alleged error was harmless beyond a reasonable doubt under the Delaware v. Van Arsdall test.

III. Relief Is Not Warranted When Any Potential Error In The Exclusion Of The Evidence Is Harmless Error Beyond A Reasonable Doubt Based Upon The Overwhelming Evidence Of Guilt Pointing Directly And Solely To Bobby Holmes As The Perpetrator.

An examination of the record in this case reveals that any error in excluding Petitioner's third-party-guilt evidence, if it was error at all, was "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). As the Court stated in Rose v. Clark, 478 U.S. 570, 579 (1986), a judgment of conviction should be affirmed "[w]here the reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt." Even if this Court should find that the South Carolina Supreme Court's determination was in error for the admission of the evidence, its analysis provides persuasive authority that this any error in the exclusion is harmless beyond a reasonable doubt.

In Chapman , the Supreme Court rejected the notion that all constitutional errors at trial necessitated automatic reversal. The Court also held that constitutional errors should be measured against a higher level of scrutiny than non-constitutional errors. Chapman, 386 U.S. at 23, 87 S.Ct. 824. Recognizing that non-constitutional errors can be treated as harmless if there is no "reasonable possibility that the evidence complained of might have contributed to the conviction," the Court in Chapman announced that constitutional errors are harmless only if the reviewing court is "able to declare a belief that [the error] was harmless beyond a reasonable doubt." Id. (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)). Beginning with Chapman and continuing in

a line of decisions thereafter, the Supreme Court has formulated a two-part analysis for assessing the import of constitutional errors committed by trial courts. Under the first facet of the Chapman test, the reviewing court determines whether the error is in a class of violations subject to the harmless error rule ("trial errors") or, instead, is within a rather narrow category of errors that require automatic reversal ("structural errors"). Arizona v. Fulminante, 499 U.S. 279 (1991). Structural errors "affect 'the entire conduct of the trial from beginning to end, such that any attempt by a reviewing court to isolate the impact of the error would be fruitless.' Because a "trial error" occurs during the presentation of t[illegible] case to the jury, the error "may be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."

As assessed in the above statement of the case, the exclusion of the proposed evidence of third party guilt was harmless beyond a reasonable doubt. As noted by the court, the forensic evidence against Holmes was unique in its combination of placing Holmes and the victim together. This evidence included: (1) Holmes' palm print was found just above the door knob on the interior side of the front door of the victim's house; (2) fibers consistent with a black sweatshirt owned by Holmes were found on the victim's bed sheets; (3) matching blue fibers were found on the victim's pink nightgown and on Holmes' blue jeans; (4) microscopically consistent fibers were found on the pink nightgown and on his underwear; (5) Holmes' underwear contained a mixture of DNA from two individuals, and 99.99% of the population other than Holmes and the victim were excluded as contributors to that mixture; and (6) his tank top was found to contain a mixture of his blood and the victim's blood. J.A. 365. However, this unique forensic evidence was not all that connected Holmes uniquely to the crime. He was also

connected by his evidence of the earlier fight and clothing which connected him into the area.

The Petitioner challenges various aspects of the state's case in hindsight. However, closer review reveals that the conclusive record continues to uniquely show Holmes' involvement. Holmes suggests that he was not in close proximity to the victim's home that morning yet his own statement conclusively suggests otherwise.[17] Holmes suggests that there were never any leads to Holmes on the day of the

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[17] **Holmes' Admitted Close Proximity Near Stewart's Home - 870 feet.**

The Brief of Petitioner, p. 3, emphasizes that when Holmes was last seen by the police, he was seen nearly a mile from Ms. Stewart's residence, traveling in the opposite direction, citing J.A. 173, 174. By this, Holmes appears to paint the picture that he was never closer to Ms. Stewart's home than one mile that morning. Holmes trial testimony and his location at the time of the arrest, which reveal that he was within 870 feet of Ms. Stewart's home early that morning.

According to his statement, during his travels after the initial confrontation at his sister's apartment and his flight from the police, he had returned to his sister's place on Cannon Court, but she would not let him in. ROA 2825-26. He stated that he left there and went through an alley, and came out on Main Street (known as Congress Street) until he got to the corner at Williams Liquor store. Id. He then stated he took a path over to Valley Road in front of the Galilee Church, to his father's residence at 124 Valley Road, claiming to have gotten there between 5:00 and 5:30 a.m. Id. He denied going down California Street that week, which intersects Congress Street. Id. Holmes' trial testimony about the route was similar. J.A. 268-271, 274-276, 286-287. In fact, Holmes testified that "I had to pass [California Street] to go to the valley, that's the direction that I'm going in." J.A. 269. Also, J.A. 286 (same).

By his own statement and testimony, during the earlier hours of the morning of the assault, after 5:20, Holmes was within eight hundred and seventy (870) feet of Mary Stewart's home, having changed direction from when the police last saw him. State Exhibit 31, ROA 2857-2859 (224 California Street is 870 feet from South Congress Street).

incident, yet the evidence reveals that there was independent evidence that a person dressed like Holmes was on California Street. [18] Holmes contends that Capt. Mobley had the opportunity to taint the blood evidence, but the evidence suggests otherwise. [19] Holmes questions the development of

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[18] Petitioner claims that the York Police Department did not have any credible leads tying Holmes to the crime as of 11:30 a.m. on December 31, 1989, and that they singled him out because he had offended Patrolman Grady Harper at the earlier incident at the apartment. The Petitioner ignores that Chief Bill Mobley testified that law enforcement had spoken to two witnesses (George Thompson and David Wilson) on December 31 who had seen an individual described as a black male wearing blue jeans and a black hooded sweatshirt in front of Mary Stewart's home in the early morning hours of December 31st. ROA 2800, 2801, 2803, 2806-07. Law enforcement had seen Holmes dressed in this fashion approximately an hour before Mary Stewart was assaulted. ROA 2405-05, 2423.

[19] Holmes also contends that Captain Mobley had access to the blood of Holmes and Stewart and had an opportunity to plant blood evidence. He contends that Ms. Stewart's rape kit disappeared during the investigation, providing Captain Mobley with yet another opportunity to plant evidence. Dr. Gwinn testified he performed a rape kit on Holmes including the drawing of blood. He stated that he sealed the vials of Holmes' blood and then sealed the rape kit box. ROA 2264. Carol Cole testified she performed a partial rape kit (because of the victim's deteriorating condition) on the victim and drew the victim's blood in the rape kit vials. She testified the vials were then sealed, placed in the rape kit box, and the box sealed. ROA 2232, 2236 and 2237. Dr. Macey testified he did a complete rape kit on the victim including drawing her blood, sealed the vials, placed the vials in the rape kit box, and sealed the box. ROA 2284-2285.

Chief Bill Mobley testified that he did not tamper with or break the seals on the rape kits while they were in his custody and that the three rape kits were sealed when they went to SLED. In addition, the clothes of Stewart and Holmes were kept separate. ROA 2803-2804. SLED Agent Larry Gainey Jr. testified that he received SLED items 1-15, plus 16-18 while in York on January 1, 1990. This would have included the three rape kits (items 4, 5 & 6) that remained sealed as he received them from Captain

another tank top found on the path, but it does not undermine the evidence of guilt. [20] Holmes speculates that the palm print was lifted from another location or "planted" by Chief Mobley,

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Mobley. ROA 2956-2957.

Agent John Barron also testified that he received all three rape kits and that when he received them the seals were intact and had not been tampered with and he forwarded the sealed blood tubes to SLED Agent Nancy Greene in Serology. ROA 2999-3000. Nancy Greene testified that the blood tubes from the three rape kits arrived to her from John Barron. The tubes were sealed and had not been tampered with when she received them. In addition, she testified that the tubes were vacuum tubes and that if they had been opened prior to her receiving them it would have been evident to her. She also testified to the fact that the tubes being expired did not affect their efficacy. ROA 3171-3176. See also: ROA 6769 (SLED Forensic Science Evidence Inventory Sheet showing Items 4, 5, and 6 as the numbers assigned to the three rape kits by SLED. Note that this document also indicates all three rape kits were turned over to Agent Larry Gainey of SLED by Captain Mobley on January 1, 1990 for delivery to the SLED laboratory); ROA 6788 (State's Exhibit 44 listing the items Nancy Greene received from John Barron including the blood from the three rape kits); ROA 6825 (a photocopy of the labels taken from all three blood vials). Also J.A. 345.

Although after January 27, 1994, some items that were returned to York Police Department were either lost or misplaced, it is clear that all three rape kits were in the custody of SLED from January 1, 1990 until their return sometime after January 27, 1994. Therefore, Captain Mobley had no access to unsealed blood vials prior to four years after testing.

[20]Holmes also asserts that the prosecution did not properly follow-up on the recovery of the tank top from a path behind the victim's home. The record indicates that a K-9 called out to the scene did not alert on the tank top ROA 2387-2388. Further, John Barron examined the tank top and found nothing of evidentiary value except dog hair. ROA 3003-3004. Finally, Agent Nancy Green processed the tank top and found nothing of evidentiary value. J.A. 235.

but there is no evidence to support this conjecture.[21] The Petitioner complains about the technique for the recovery of the fibers, but there is no evidence to support this conjecture. [22] Holmes also contends that there was no coherent explanation given by Chief Mobley for the delay in shipping one of the paper towels taken from the victim's home to SLED, but a reasonable explanation was given and the evidence results could not have been affected. Finally, the Petitioner speculates

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[21]First, Chief Mobley denied planting any print. ROA 2804. Steve Derrick, an expert in crime scene analysis and an instructor on the techniques of fingerprinting, testified generally as to the difficulty inherent in "planting" a fingerprint. ROA 2901-2905. In addition, he testified that the photo of the palm print *in situ* has the same characteristics as the palm print he was given to examine. Particularly, based upon his expert observation, he did not see any indication of fingerprint forgery or misrepresentation. ROA 2920-22.

[22] The Petitioner contends that the procedure used by Agent Barron for scraping clothes for fiber evidence allowed for possibility of cross-contamination. J.A. 227. Barron testified that the methods he uses to collect fibers from trace evidence is consistent with techniques he learned from the F.B.I.. He used a clean room where there is positive air flow. He also wears a clean lab coat. With each piece of evidence independently evaluated, Barron placed a separate clean piece of paper upon a metal table. He visually scanned the item and initially removed all hair and fibers. ROA 3015-16. He then used a metal spatula and scraped the item. At that point, he views the paper underneath the item for additional fibers and secures them. ROA 3016, 3018. In order to avoid cross-contamination, Barron used a clean room, cleaned the metal table after each use, used clean utensils, used a new sheet of paper for each item. Although the items would be opened in the same room, he treated each item independently and would not open two bags of evidence at the same time. ROA 3020. Barron admitted that there is a difference of opinion on the use of tape or scraping, but declared the this was the method he had been trained on through the F.B. I. courses. ROA 3018-19. Importantly, defense expert John Kilbourn testified that he did not always use the tape method in his analysis of fibers and that he had used the scraping method during his career up until 1980 and had believed it to be reliable. ROA 3920-21.

concerning a failure to test the currency recovered from Holmes for fingerprints, yet there is no subsequent result that suggests it did not come from the victim's home that morning.[23] Further, Jimmy White DNA did not match any of the trace evidence tested. Finally, the third party guilt evidence, as noted by the trial court and the state supreme court was questionable as to its veracity and lack of any details.

In viewing the evidence before this court, it provides a sound basis to concluded that if it was error to exclude the tenuous third party guilt evidence, it was harmless beyond a reasonable doubt. The judgment of the South Carolina Supreme Court must be affirmed.

CONCLUSION

For the reasons set forth above, certiorari should be dismissed as improvidently granted based upon the jurisdictional defect in the presentation to the South Carolina Supreme Court. Alternately, the decision of the Supreme Court of South Carolina must be affirmed.

Respectfully submitted,
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January 11, 2006.

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[23]Upon his arrest, Holmes wallet contained $44 dollars, consistent with the reported $40 dollars stolen from Ms. Stewart. The Petitioner criticizes the prosecution's failure to test these items for fingerprints to determine if Ms. Stewart's prints were on these items from Holmes wallet. J.A. 325. However, examiner Steve Derrick testified at that he did not believe the enhanced "physical developer" technology now available to use on paper items existed at the time. However, he admitted that he had not been given any currency to test in 1990. J.A. 222-225.